1953

Doris E. Wells v. Ray A. Wells : Defendant-Brief of Appellant

Utah Supreme Court

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In the Supreme Court
of the State of Utah

DORIS E. WELLS,
Plaintiff-Respondent,

vs.

RAY A. WELLS,
Defendant-Appellant.

No. 8015

DEFENDANT-APPELLANT'S BRIEF

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NATURE OF THE CASE

" . . . Only occasionally have superior minds closely considered the principals involved and undertaken to define, with care, the boundaries of the jurisdiction of courts and the circumstances under which their jurisdiction will and will not attach."

(14 *Am Jur, Courts,* #159)

This appeal primarily involves two legal issues which apparently have not been ruled upon by the Supreme Court

of the State of Utah. The first issue relates to the jurisdiction of the District Courts of this state in divorce actions; the second issue involves an interpretation of Rule 15(b) and (d), Utah Rules of Civil Procedure, concerning the power of a court to permit plaintiff-respondent (the losing party), after trial and judgment, to file and to recover judgment upon amended and supplemental pleadings which set forth an entirely new theory of recovery inconsistent with, and repudiated by, all prior pleadings of that party.

The lawsuit involved in this appeal was initially brought by the respondent, hereinafter designated as the plaintiff, against this appellant, hereinafter designated as the defendant, upon a complaint containing two separate counts asking for support and alimony for the plaintiff and the minor child of the parties. The jurisdictional issue involved is primarily one of whether or not a non-resident divorced woman, without any Utah residency or domiciliary background, can enter the courts of Utah for the purpose of securing alimony and support for herself and the minor child of the parties from a former husband who secured a divorce from her in a Nevada proceeding 2½ years prior thereto, she assuming the Nevada decree to be valid as to dissolving the marital status, but claiming the right to secure alimony and support in an "independent" action.

This defendant contends that the District Courts of Utah do not have jurisdiction over the subject matter of such actions. This defendant further maintains that the plaintiff has followed an improper procedure throughout the action and must resort to the proper procedures provided by law for seeking what-

ever relief she is entitled to so that he at the same time may be accorded adequate representation in the matter.

The second chief issue relates to the limits of discretion which our District Courts can exercise under Rule 15(b) and (d) of Utah Rules of Civil Procedure in permitting a plaintiff who has brought an action to trial on a substituted theory—raised by a "Reply"—that the Nevada decree of divorce secured by this defendant was null and void by reason of being fraudulently obtained and lacking jurisdictional requirements, and who failed to prevail on such theory, to thereupon, after trial, and in the absence of any evidence in support thereof, petition the court to allow her, after previously unequivocally maintaining the applicable portion of the Nevada divorce decree to be invalid, to set up that very provision of the Nevada decree as a new cause of action in an "Amended and Supplemental" pleading, and to recover judgment against this defendant upon such amended pleadings on a subsequent Motion for Judgment on the Pleadings.

FACTS OF THE CASE

Plaintiff is a resident of the State of New York. This defendant was a resident of the State of Utah when this action was commenced. Plaintiff and defendant intermarried at Watertown, New York, on April 4, 1943, and had a daughter born as issue of said marriage, now of the age of approximately nine years.

On October 6, 1949, this defendant, after establishing residence in the State of Nevada, secured a decree of divorce

from the plaintiff, she having been personally served with summons and a copy of the complaint by constructive service in the State of New York. She did not appear in or contest the proceedings nor did she appeal from the same. The decree entered in the Nevada court did not provide alimony for the plaintiff, but did provide the sum of $35.00 per month as child support for the minor child of the parties. Shortly after securing the decree, this defendant remarried, moved to Utah, and became a resident of this state.

On or about June 19, 1952, plaintiff filed an action in the Third District Court of Utah, seeking relief on two separate counts. The first count assumed the Nevada decree to be valid insofar as it dissolved the marital status between the parties, but denied its validity as to the right of the plaintiff to receive alimony for herself and support money for the minor child (R. 2). The complaint prayed that the court fix and determine the amount of alimony to be paid to plaintiff and the amount of support money to be paid to the plaintiff for the minor child of the parties notwithstanding any provision of the Nevada decree (R. 3).

The complaint was composed of two counts ("causes of action") substantially as follows:

> COUNT I. To secure child support and alimony for herself in an "independent" action, separate and apart from seeking an actual divorce, *as to the future.*
>
> COUNT II. To secure reimbursement for *past amounts expended* for child support and alimony for herself from October 16, 1948, until the time of the filing of the complaint.

In addition, an Order to Show Cause, attached thereto, asked for temporary support and alimony and temporary attorney's fees pending the litigation. However, the relief sought by this and two similar subsequent motions raised by plaintiff (one of which asked for travel expenses for plaintiff from New York to Utah for the purpose of appearing at the trial) were denied by District Judges Martin M. Larson (R. 4) and David T. Lewis (R. 40) for the reason that no marital status existed upon which such orders could be made.

Defendant thereupon (by Amended Answer—R. 21) answered the complaint (as amended by interlineation (R. 2) to delete the plaintiff's claim for *past* amounts allegedly owing for her own support) and admitted that the Nevada decree was not binding on the subject of child support, but asserted that it was binding upon the plaintiff's right to receive alimony. In addition, defendant affirmatively alleged that the parties had entered into an agreement prior to securing the Nevada divorce whereby the plaintiff had agreed not to ask for support money for herself or the minor child of the parties upon the condition that defendant would not molest the child nor ask for its custody, and alleged that he had complied with the agreement in all particulars. The foregoing defense was raised only as to the second cause of action which asked for *past due amounts* expended for child support up to the commencement of this action. This defense was permitted to stand, against plaintiff's objection, by Judge Baker and was also acknowledged by Judge Van Cott (see infra).

This defendant admitted that the minor child could recover *on its own behalf in the event of future need,* notwithstanding

any agreement between the parties, but further affirmatively alleged that child support in the past had not been contributed by the plaintiff, but had been contributed by other persons.

Defendant also took the position (R. 8) that the Third District Court had no jurisdiction over the subject matter of the action and could not grant the relief prayed for.

After this defendant had filed his Amended Answer, plaintiff was permitted, over the objection of defendant raised before Judge Baker by a Motion to Strike and Dismiss, to file a Reply (R. 19) in the action. The Reply asserted in substance that the Nevada decree was null and void.

On April 7, 1953, after a "trial" in the above case, at which neither the plaintiff nor any witnesses on her behalf appeared, and after subsequently permitting plaintiff to file an Amended and Supplemental Complaint (R. 44) after she failed to prevail in the trial of the action, Judge Ray Van Cott granted judgment to the plaintiff (R. 103) on the Amended and Supplemental Complaint. This was based, in part, upon a finding of fact (R. 101) to the effect that the Nevada decree was valid and subsisting in all respects. As indicated, this judgment was based upon the Amended and Supplemental Complaint filed by the plaintiff *after* the adverse ruling of Judge Van Cott after a trial which was based on the Complaint and the Reply filed in the original action.

Plaintiff was given a money judgment for $1,435.00 accumulated child support under the Nevada decree and $200.00 attorney fees (the matter of attorney's fees being raised only by the Amended and Supplemental Complaint), and

defendant was ordered to make payment of the sum of $35.00 per month, as per the Nevada decree which was established as a decree of the Third District Court, on and after April 1, 1953.

To simplify the events which have taken place in the past year in this case, suffice it to say that many objections, arguments and motions were made before various judges of the Third Judicial District, the total of which consume more than three pages of docket entries. Since many of them are only incidentally material to the issues raised on this appeal, the record has been abbreviated as much as possible for the benefit of this court.

NOTE: Wherever italicized material appears in any text or quoted provision in this brief, the same has been added.

STATEMENT OF POINTS

Defendant submits the following points as reasons for seeking a reversal of the judgment of the lower court:

I. The Third District Court had no jurisdiction over the subject matter of the complaint to which the relief prayed for was related.

II. Even if the court had jurisdiction, it erred in permiting the filing of the Amended and Supplemental Complaint after trial.

III. Even if the court had jurisdiction and if it properly allowed the filing of amended and supplemental pleadings, it erred in granting judgment on the amended and supplemental pleadings.

ARGUMENT

(I)

The Third District Court had no jurisdiction over the subject matter of the complaint to which the relief prayed for was related.

The two counts of plaintiff's complaint set forth purported causes of action asking for support and alimony for the plaintiff and the minor child of the two parties. In so doing, the plaintiff assumed that the Nevada decree of divorce was valid only insofar as it dissolved the marital relationship, but contended that she should have the right to bring an "independent" action for the purpose of securing alimony for herself and support for the minor child of the parties without asking for a divorce.

As authority for bringing such an action, the Utah case of *Hutton vs. Dodge,* 58 *Utah* 228, 198 *Pac.* 165, *is cited. In* that case the wife—a resident of Utah—brought a Utah divorce proceeding. Personal service of the husband in Utah could not be effected. Thereupon, she was granted a divorce based upon constructive service of process, but the decree specifically left open the matter of alimony until the defendant could be personally served in Utah. In ruling on the case, our court felt that the husband could not thereafter be brought before the court by service of a motion since it would not give jurisdiction of the person, but stated that a separate independent action would lie

> " . . . in a *case of this kind,* where jurisdiction of the defendant is *afterwards* seasonably obtained and the *rights of third parties have not intervened* . . . "

Note: This defendant remarried soon after the Nevada decree was issued, and came to Utah where he resided for more than 2½ years before any demand was made upon him by his former wife. She, at all times, was aware of his whereabouts (R. 88 and 72).

Sec. 30-3-5, Utah Code Annotated, 1953. *Disposition of Property and Children.*

> "*When a decree of divorce is made* the court may make such orders in relation to the children, property and parties, and the maintenance of parties and children, as may be equitable; . . . Such *subsequent changes or new orders may be made by the Court* with respect to the disposal of the children or the distribution of the property as shall be reasonable and proper."

The foregoing statute clearly provides that there must at least be an antecedent Utah divorce proceeding before the rule of Hutton vs. Dodge is to apply. Hutton vs. Dodge is an exception to the general rule that alimony and support can only be granted as an incident to a divorce proceeding. However, the courts, writers and annotators have been careful to limit it to situations where

(a) the wife was the moving party originally; and

(b) Where the original divorce proceeding was commenced in the same state.

See 42 *ALR* 1386-7:

> "II. Divorce decree in *same* state or country.
>
> A. *Procured by wife.*"
>
> (with discussion of the case of Hutton vs. Dodge)

In connection with the foregoing ALR citation, one other case in addition to Hutton vs. Dodge was cited as an exception

to the general rule. That case involved a decision of the court of Massachusetts. However, upon examining and reading the Massachusetts case, it can be seen that the exception in that situation was provided by statute and not by court decision alone. Hutton vs. Dodge seems to be about the only case where the foregoing limited exception has been superimposed upon statutory law by court decision. It seems clear, however, that an application of the rule set forth in the case of Hutton vs. Dodge was never intended to apply to *non-residents* entering our courts.

Hutton vs. Dodge is based upon the premise that the wife, being the moving party, never had the opportunity of having her "day in court." It is interesting to note that had the plaintiff in this action sought to contest the Nevada decree (wherein she was defendant), or otherwise make any appearances in such action, the courts of Nevada would have furnished her with travel expenses (which she unsuccessfully sought to secure in this Utah proceeding) to take her to Nevada from New York. This rule was recognized in the Nevada case of *Ormsley vs. District Court,* 51 *Utah* 339, 276 *Pac.* 14.

Now when we attempt to apply the rule of Hutton vs. Dodge to a non-resident woman entering our courts we meet this problem: By what authority do our courts acquire jurisdiction to entertain the action?

This defendant asserts that our courts lack jurisdiction of the subject matter of such an action.

> "There was no common law right of divorce. *Divorce is purely a matter of statute."*

Jelme vs. Jelme, 98 *NE* 2*d* 401, 22 *ALR* 1300, 155 *Ohio St.* 226.

Divorce was not recognized at common law; nor was alimony. Alimony must find its basis in a divorce action and is dependent upon an existing marriage. In this connection Utah has provided for "alimony" after marriage *as an incident of a divorce proceeding*. See Title 30, Chapters 3 and 4, Utah Code Anno., 1953. It is submitted that there is no provision in our codes nor any judicial decision which allows a non-resident woman to enter our courts to determine an allowance of alimony and support for herself or for a child, *in the manner here sought*, after a divorce decree of another state terminates the marital status.

Counsel for plaintiff wife will undoubtedly refer this court to several decisions wherein separate alimony actions after divorce have been permitted, but *every single case* is justified only by reason of the statutory law of that particular state permitting an alimony action separate and apart from seeking a divorce. Approximately six jurisdictions have statutes with provisions more or less similar to that of Ohio, but Utah has no such statute:

Page's Ohio Gen. Code Anno.

Section 11980 . . . "*Except in an action for alimony alone,* plaintiff must have been a resident of the state at least one year . . . The court shall hear and determine the case whether the marriage took place, *or the divorce occurred, within or without the state.*"

Note: *Wick vs. Wick*, 58 *Ohio App.* 72, 15 *NE* 2*d* 780, admits that Ohio is among a minority of jurisdictions permitting separate alimony actions as provided by the foregoing statute.

Statutes of Oklahoma:

Section 1284. *Alimony without Divorce.*

"The wife or husband may obtain alimony from the other *without a divorce,* in an action brought for that purpose in the District Court, for any of the causes for which a divorce may be granted."

Similar statutes are found in Kentucky, Kansas, Florida, Georgia and a very few other states.

Our statutes are not sufficiently broad to permit plaintiff to enter our courts, nor do they give our courts jurisdiction to entertain the subject matter of the action or to give the relief originally sought. A careful persual of the provisions of Chapter 3 of Title 30 of our Code will reveal that all support provisions for both wife and child come under the heading of "Divorce".

This contention is very clearly brought out in 27 *CJS* 1278 (which incidentally is the same rule adopted by the Restatement of Conflict of Laws in Sec. 457 and 463, leaving the matter up to the legislature):

> "*Under a statute so providing,* a court may award alimony *after a divorce has been granted outside the state.* The purpose of such a statute is to enlarge the *jurisdiction* of the court and empower it to prevent, so far as possible, the state from being a haven for former husbands immigrating to it to avoid alimony obligations. While, in a suit under such a statute, allegations as to other litigations and awards of alimony under the divorce decree are impertinent and improper . . . the statute is permissive, rather than mandatory . . . *In the absence of statutory authority,* a suit, whether commenced before or after the rendition of a foreign

decree, to obtain an award of alimony as distinguished from a suit to enforce a foreign decree from alimony or to correct arrears thereunder, *may not be maintained* after the court of another jurisdiction has granted a divorce with or without alimony . . . "

The Maryland court (and there are many other decisions to the same effect) has said in the case of Staub vs. Staub, 183 A. 610:

> "We are unable to conclude that the right to maintain a proceeding for alimony may survive the dissolution of the marriage relation, since alimony is founded upon the common law obligation of a husband to support his wife, which, *in the absence of some saving statute,* must necessarily end by the passage of a decree effectively dissolving the marriage tie, and it seems to us that the cases in other jurisdictions adopting this view are justified by justice and reason."

The New Jersey court, 10 N. J. Eq. 138, in ruling upon a New Jersey statute similar to the statutes of Utah and California, stated that the jurisdiction of the courts of equity in cases of divorce and alimony are prescribed by statute authorizing the courts to render decrees for maintenance and alimony when a divorce is decreed, and another providing that it shall be lawful for the court to order alimony without connecting such order with a decree for divorce, where the husband has, without justifiable cause, abandoned his wife or separated himself from her, and refuses or neglects to maintain or provide for her. The court held that the court of equity in New Jersey had no jurisdiction to decree alimony alone, except in cases expressly authorized by statute.

It is interesting to note that in 1938 New Jersey, by legislative action, provided that actions for alimony could be maintained separate and apart from divorce actions, thus altering the foregoing court ruling based upon prior statutory law.

The Restatement of Conflict of Laws has left the matter of alimony entirely to the legislature:

> *Section* 457.
>
> "A state has *legislative* jurisdiction to impose upon one person a duty to support another person if, (b) the person to support is domiciled within the state although the person to be supported is not subject to the jurisdiction of the state . . . "
>
> *Section* 463.
>
> "Alimony can, in its discretion, be granted by a court under the law of its own state . . . "

In the case of *Bowman vs. Worthington,* 24 *Ark.* 522, the court indicated, in interpreting statutes similar to those of Utah, that alimony is an incident to divorce and it may be allowed, under the phraseology of the Arkansas statute, only as an incident of divorce and in connection with the divorce.

This defendant further maintains that plaintiff must, even if this court were to permit her to maintain an independent action, plead the required residency for three months as required in divorce actions. This point was not involved in Hutton vs. Dodge, since the wife had previously been a resident of Utah when the divorce proceeding commenced, but the court answered the issue in unequivocal terms:

"She could not follow her husband into another state and obtain relief for she would first have to establish a residence there before she could sue."

Plaintiff may contend that the issue of a three-month residency period is a mere formality in pleading the *"cause of action"* and that it is not a *jurisdictional* requirement. In answer to this contention the Utah case of Weiss vs. Weiss (1947), 111 Utah 353, 179 Pac. 2d 1005, has taken a definite stand:

"If it (the Court) finds that there was no such residence, it has no power to *further act as to the marriage contract;* and if it acts in such regard, it exceeds its authority."

"As the plaintiff did not have the residence required by the statute the district court did not obtain *jurisdiction of the status of marriage* in this case *and any judgment or order made in reference thereto* is of no effect."

. . . . .

In the second count of her complaint plaintiff attempted to set forth a claim for reimbursement to herself for past amounts spent for herself and the minor child. In answer to the jurisdictional matter involved in such a claim, the very recent California case of *Dimon vs. Dimon* (*May* 27, 1952—*California District Court of Appeals*) 244 *Pac. 2d* 972 *at* 978 answers the point raised in plaintiff's second count:

"Respondent has not cited any case in which it was held that an action for support of children could be maintained under such circumstances and we have found none. Here the action *was not brought by the minor children, nor by the mother as their guardian.*

> The action was brought by the mother *mainly to reimburse* herself for moneys which she had paid out in the support of the minors. No reason has been advanced why there should be distinction (in the matter of the court's jurisdiction) between a recovery for the wife's own support and a reimbursement of moneys paid for the children."

This writer refers the court to the case of Dimon vs. Dimon as a very clear analysis of the general problem involved in this entire action. In fact, the Dimon case cites the Utah case of Hutton vs. Dodge as an exception to the general rule against allowing a wife to bring a subsequent alimony action and, in so doing, gives it the same limited scope that the annotators of ALR have given it. No case can be found which interprets the exception of Hutton vs. Dodge to be extended to non-residents entering our courts. To so extend the exception would be for the courts to usurp the functions of the legislature.

In a separate concurring opinion at page 979 Justice Goodell quoted five sections of the California Civil Code, basically similar to our Utah Code sections referring to divorce, and stated:

> "The language of the 5 sections just emphasized shows a consistent and studied legislative purpose to confine and limit the powers of the court to the period of time when actions for divorce, annulment and separate maintenance are pending, which of course includes time on appeal, 1049, Code Civ. Proc., and such further time (e.g., during minority, or by a reservation in a decree) as may be properly within the scope of the same action."

" . . . In the pending case the wife, after her Connecticut divorce had become final, sought and obtained, in a new independent action with no underlying California antecedents an alimony order in this state of which she was not a resident. It is difficult to see how this could be accomplished."

It is interesting to note that on appeal to the California Supreme Court, the case of Dimon vs. Dimon was affirmed in a lengthy decision. It can be found at 254 Pac. 2d 528 and was decided on April 25, 1953. It is also interesting to note that the subject of child support was thoroughly discussed. In this connection, California, like Utah, provides that child support and alimony are proper incidents of divorce decree only by virtue of statute. However, California now has a special statutory law allowing the mother to bring an action in her own name on behalf of the child, separate and apart from a divorce action. This is found in Civil Code 137.1:

137.1 *Action for support, maintenance and education of children.* "When a father or mother has the duty to provide for the support, maintenance and education of the children of the father and mother and wilfully fails to provide for such support, maintenance and education, the father or mother, as the case may be, or any child by its guardian ad litem, may maintain an action in the superior court against the mother or father, or both, as the case may be, for the support, maintenance and education of said children."

Similarly, the State of New York has provided a special law by Section 137, subdivision 1 of the Domestic Relations Court of the City of New York:

"If the marriage relationship shall have been terminated by final decree of the Supreme Court of the State

> of New York or by a judgment of any other court of competent jurisdiction, when valid in the State of New York, a petition may be filed for an order for support made or enforced in the family court only for the benefit of a child of such marriage."

From the foregoing statutes (of which Utah has no similar provision) the only way that a mother can sue in her name after divorce, and in the manner contemplated by the two counts of plaintiff's original complaint, is by virtue of a special statute. In the absence of such a statute, as indicated in the Dimon case, plaintiff would have to bring her action in Utah on behalf of the child only—and not for herself—either as *guardian ad litem of the child* or by using the Uniform Reciprocal Enforcement of Support Act provisions. This matter will be again referred to at a later point.

It is interesting to note that when Dimon vs. Dimon was affirmed on appeal, Justice Traynor, the only justice who dissented in part (and who will undoubtedly be quoted by plaintiff), acknowledged that a state such as California (or Utah) should not entertain an action of the type here brought if the state of the matrimonial domicile (New York) would not have entertained such an action (254 Pac. 2d 528 at 541):

> "A former wife, however, would not be permitted to bring an action in California for support following an ex parte decree, if a similar action would not be entertained by courts of the state where she was domiciled at the time of the decree . . . the *full faith and credit clause* would compel California to give the same effect to the decree and hold that the decree not only dissolved the marriage status but terminated the wife's right to support . . . If the husband obtained the decree

in another state and under the law of the state of the wife's domicile her right to support was lost when the marriage status terminated, *she would likewise be not allowed, by migrating to another state, to revive a right that had expired.*"

Now let us look at the New York cases since plaintiff is and was a resident of the State of New York. In a case of this kind, New York would not have entertained the claim for alimony and child support set forth in plaintiff's complaint. In the case of *Adler vs. Adler* (1948) 192 *Misc.* 953, 81 *NYS 2d* 797, the New York court pointed out that the basis for an alimony action is the existence of a conventional marital relationship, and that no action for support in favor of the wife would lie where the relationship had been severed by a decree of a court having competent jurisdiction.

In the case of *Harris vs. Harris* (1952) 979 *App Div.* 542, 110 *NYS 2d* 824, the husband secured an Illinois divorce, based upon constructive service against the non-resident wife. It was held that the validity of the foreign decree barred the wife from claiming temporary alimony since the foreign decree destroyed the very ground upon which the wife's complaint necessarily rested. Other New York cases in point and to the same effect are Taffel vs. Taffel (1943) 181 Misc. 259, 43 NYS 2d 777, Standish vs. Standish (1943) 179 Misc. 564, 40 NYS 2d 538, and Davies vs. Davies (1946) 187 Misc. 313, 62 NYS 2d 790.

. . . .

After the filing of this defendant's Amended Answer, the plaintiff interjected and substituted an entirely new cause of

action in place of her original counts by means of a pleading designated as a "Reply" (R. 19). Over the objections of this defendant raised on a Motion to Strike and Dismiss, Judge Baker permitted the Reply to stand. It is submitted that the court's ruling was clearly erroneous, as will hereinafter appear.

The sum and substance of the Reply, as claimed by counsel for plaintiff in objecting to the granting of an Intermediate Appeal by this Court (the file of which is in the office of the Clerk of the Utah Supreme Court and contains the following quoted statement), was that the wife was setting up a new and substituted cause of action on the theory of separate maintenance:

> " . . . That by this Complaint and reply, the wife sets up a cause of action for her own support, as the legal wife of the husband, and for the support of the minor child of these parties . . ."

From the foregoing statement, it appears that the plaintiff abandoned the first two counts of the complaint and substituted an entirely new cause of action, the new "cause of action" being based on the assumption that the Nevada decree was totally null and void, that she was still the legally married wife of the defendant and that her theory of recovery was separate maintenance. In short, she did a flip-flop.

Under Rule 7(a) of Utah Rules of Civil Procedure this Reply should never have been allowed to be introduced. The defendant maintains that he has been denied due process of law under the Constitutions of the State of Utah and of the United States in that he is not granted, under Rules 7(a) and 12(a), an opportunity to appear and defend against the

allegations of a "Reply" which attempts to introduce a new cause of action, particularly where he may have affirmative matter to plead in defense thereto.

If the Court will examine the "Reply" (R. 19) the following facts will be noted:

(1) It sets forth matter entirely contradictory to that raised in the complaint, and adopts a new theory;

(2) In and of itself it does not set forth any cause of action;

(3) When viewed in connection with the complaint, it still fails to supply the necessary ingredients to plead a cause of action for separate maintenance or any other claim;

(4) If it seeks to set aside the Nevada decree of divorce, it certainly does not ask for such relief, nor does it pray for any relief; and

(5) If it conceivably sets forth a cause of action for separate maintenance, it must relate back to the original complaint. In so doing, the plaintiff pleads herself out of court because the complaint alleges that there exists a *separate agreement* (R. 1).

6 *ALR p.* 75 citing cases):

"Generally a separation agreement between husband and wife which is not inequitable is a defense to the wife's action or suit for separate maintenance."

This writer frankly admits that he was, and is, in a quandry as to just what plaintiff was attempting to do or plead by her Reply. Although Judge Baker permitted the Reply to stand and even granted a motion permitting travel expense

money from New York based upon such Reply (which Judge Lewis later set aside on contempt proceedings), it was not entirely clear until after written briefs had been submitted during certain phases of the case and until the actual "trial" of the case, that plaintiff had thoroughly and completely reversed her theory of action. This writer attempted to secure a statement from plaintiff's counsel as to just what he was attempting to do by means of this Reply, but counsel would neither commit himself nor clarify his stand.

If plaintiff has succeeded in raising a new cause of action by her "Reply," this writer will seriously consider re-learning all of the pleading which he has ever known. Without citing a large number of cases, the writer will merely refer to standard legal texts:

> 41 AM JUR, PLEADING:
>
> SEC. 177. FORM, CONTENTS, AND SUFFICIENCY—"*The replication or reply should not materially depart from the plaintiff's initial pleading,* nor reassign or repeat the allegations contained therein, *for it is no part of the office of a reply to allege matters which are necessarily a part of the cause of action* and which must be sustained by the plaintiff's proof in opening . . . The replication or reply should relate back to the plaintiff's initial pleading and *re-enforce the cause of action* therein pleaded . . . "
>
> SEC. 179. OPERATION AND EFFECT—"It is clear from the function of a reply, as above explained, that *it cannot aid the complaint by supplying omissions therein, broadening its scope,* or *adding new grounds of relief.*" . . .
>
> SEC. 185. WHAT CONSTITUTES—" . . . The plaintiff in his replication or reply will not be permitted

to materially change the position taken by him in his initial pleading and bring forward a new and distinct cause of action from that declared on."

SEC. 187. PARTICULAR APPLICATIONS—" . . . there is a departure when the plaintiff's reply brings forward a distinct cause of action from that declared on in the complaint."

In connection with the filing of a reply in the manner here attempted, our Utah court in the case of Combined Metals, Inc., vs. Bastian, 267 Pacific 1020, 71 Utah 535 at page 554, has made the following declaration:

"The reply thus was not only inconsistent within itself, but stated a different cause, on a different theory, on a different ground, and on a different contract from that stated in the complaint, and was a complete departure therefrom. It, of course, is familiar doctrine that where allegations of a declaration are repugnant to and inconsistent with each other, they thereby neutralize each other and render the declaration bad . . . "

The purpose of the foregoing argument relating to the Reply is pertinent to this appeal for the reason that if the two original counts in plaintiff's complaint failed because the court had no jurisdiction over the subject matter of the complaint, then the Reply, since it must relate back to the complaint and since its very validity and existence is based upon the complaint, should have also been stricken on jurisdictional grounds as well. The Reply, if it be conceded as the proper subject for a Reply, cannot cure the jurisdictional defect inherent in the Complaint.

An examination of the transcript will show that the evi-

dence which counsel for plaintiff introduced at the trial related wholly and solely to the attempt to set aside the Nevada divorce decree. In other words, all of the evidence that was introduced related to the cause of action allegedly set forth in the Reply. There was absolutely no evidence touching upon the two counts of the Complaint. As such, the evidence should have been inadmissible. And since the Complaint failed for lack of jurisdiction over the subject matter, no evidence should have been admitted relating to the Reply.

(II)

Even if the court had jurisdiction, it erred in permitting the filing of the Amended and Supplemental Complaint after trial.

After the trial of the case—at which neither the plaintiff nor any witnesses in her behalf appeared—and after attacking the validity of the Nevada decree in all respects, including the portion relating to child support, plaintiff's attorney was permitted to file an Amended and Supplemental Complaint (R. 44). It was upon this pleading that judgment on the pleadings was given. As stated heretofore, despite attacking the Nevada decree in all respects in the Reply, the Amended and Supplemental Complaint was based entirely upon the Nevada decree and every provision therein contained.

This defendant maintains that the court improperly allowed plaintiff to file the Amended and Supplemental Complaint. If we refer to Rule 15(b) and (d) of Utah Rules of Civil Procedure, we will find the following provisions for allowing the filing of amended and supplemental pleadings:

RULE 15

AMENDED AND SUPPLEMENTAL PLEADINGS

(b) AMENDMENTS TO CONFORM TO THE EVIDENCE. *When issues not raised by the pleadings are tried by express or implied consent of the parties,* they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleading *as may be necessary to cause them to conform to the evidence and to raise these issues* may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court shall grant a continuance, if necessary, to enable the objecting party to meet such evidence.

(d) SUPPLEMENTAL PLEADINGS. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting *forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented.* If the court deems it advisable that the adverse party plead thereto, it shall so order, specifying the time therefor."

Defendant wishes to point out to the court, and the transcript of the testimony at the trial (containing only evidence elicited from defendant when called as a witness by counsel for plaintiff) so indicates, that the Amended and Supplemental Complaint did not relate to any "issue not raised by the plead-

ings which was tried by express or implied consent of the parties . . . " In fact, the Nevada decree of divorce was not even offered in evidence at the trial but was only incorporated in the pleadings on behalf of the parties for limited purposes. Specifically, plaintiff took the position that the Nevada decree was not binding on the right of child support. This statement can be found in paragraph 5 of plaintiff's original Complaint (R. 2):

> " . . . There was no final adjudication as to the . . . right of this plaintiff . . . to receive support money for the support of her minor child."

In this defendant's Amended Answer, he answered and agreed to plaintiff's contention concerning child support, as follows (R. 22):

> "Defendant admits that said adjudication was not binding on the right of plaintiff to receive support money for the support of the minor child of the parties."

From the pleadings and from the evidence introduced at the trial, there was no issue before the court concerning the effect of the Nevada decree on the right of plaintiff to secure child support. From the clear-cut allegations of the pleadings and evidence, it can hardly be seen how the amended complaint related to " . . . issues not raised by the pleadings" which were " . . . tried by express or implied consent of the parties." Furthermore, the rule is mandatory that the amendments must "conform to the evidence . . ." Defendant submits that there is not a scintilla of evidence on plaintiff's behalf which will supply any single ingredient necessary to granting

permission to file an Amended and Supplemental Complaint. All of plaintiff's evidence was precisely to the contrary.

In the case of *Apex Smelting Co. vs. Burns, C. A. Illinois,* 1949, 179 *Fed. 2d* 978, interpreting Federal Rule 15, it was stated:

> "Here, for the first time plaintiff advances the theory that defendants were liable on breach of contract . . ."
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> Quoting from 79 F. Supp. 654, 658:
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> "The effect of the amendment they propose would be not to conform the pleadings to a judgment they had won, but to jeopardize and perhaps to overthrow a judgment they had lost. If this latter application of the rule were permitted, a losing party, by motions to amend and rehear, *could keep a case in court indefinitely, trying one theory of recovery or defense after another, in the hope of finally hitting upon a successful one."*

Also, *U. S. vs. Southern Pacific Co.* (Oregon), 75 *F. Supp.* 336 at 339, states:

> "A new and distinct lawsuit should never be injected into a case by filing a supplemental pleading. This rule is inherent in all systems of pleading, common law, code or federal. It is required by the necessities. Confusion would otherwise result."

Another matter was brought up after trial which did not conform to the pleadings or any evidence introduced at the trial. Counsel for plaintiff in the Amended and Supplemental Complaint asked for counsel fees in the sum of $300.00. No plea for counsel fees (other than for temporary fees) was raised in the original Complaint or Reply, nor was any mention of

the same included in the evidence introduced at the trial. The request for this relief was apparently an afterthought on the part of counsel to secure something which was not asked for at the proper time. The court allowed counsel the sum of $200.00 as attorney's fees, apparently based upon securing child support under the Nevada decree. In this connection, after trial, when plaintiff's counsel asked for judgment on the pleadings (the Amended and Supplemental Complaint and the Answer thereto) he admitted on cross-examination that despite the fact that he put forth legal services in the original action (in which plaintiff failed to prevail) in the sum of about $1,250.00 to $1,500.00 (R. 93), he merely made an appearance in court asking for judgment on the amended and supplemental pleadings, and drew up a short Amended and Supplemental Complaint. For these services plaintiff was granted judgment for $200.00. It appears that the court was, in effect, basing the allowance of counsel fees upon an abortive effort to show the invalidity of the Nevada decree.

Since the allegation requesting attorney's fees was the only "supplemental" portion of the Amended and Supplemental Complaint, we are faced with the rule announced in the case of *Randolph vs. Missouri R. Co. et al,* 78 *F. Supp.* 727 *at* 729:

> "A supplemental petition, of course, must be based upon things that have occurred since the filing of the original complaint *and must be based upon the same cause of action as the original complaint."*

Since the Third District Court had no jurisdiction to entertain the original causes of action set forth in plaintiff's original Complaint and her Reply, the Amended and Supplemental

Complaint permitted by Judge Van Cott after trial cannot cure the jurisdictional defect. For that reason, on jurisdictional grounds alone, the final judgment is null and void.

When plaintiff tried to assert a new cause of action after trial in her Amended and Supplemental Complaint based upon the decree of the State of Nevada, the applicable portion of which she had previously steadfastly maintained to be invalid, it is very clear that a new and distinct lawsuit was injected into the action upon a point which was moot and made res judicata by prior pleadings of the parties.

> *Fairbanks, Morse & Co. vs. Consolidated Fisheries Co. (Delaware)* 94 *F. Supp.* 311 *at* 320:
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> " . . . Now, after losing its case, defendant shifts its position and proposes amendments alleging an action sounding in tort . . . The effect of the proposed amendments is to reopen the case and relitigate the question of defendant's liability . . . The . . . action of a court permitting such amendments is based on the court's discretion and this cannot be an unbridled discretion."

Quoting (see R. 92 and 93) from the case of *New York Central & H.R.R.Co. vs. Kinney,* 260 *U. S.* 340, 346, 43 *S. Ct.* 122, 123, that court stated:

> "The first special defense is that the amended complaint set forth new and distinct causes of action, which were not contained in the original complaint and were not brought within the time limited by law . . . I think the defense is good."

Concerning the power of a court to permit an amendment in the manner sought in this action, the Utah case of Combined Metals, Inc. vs. Bastian (supra) also clearly set forth

the proposition advanced by this defendant at 71 Utah, page 554:

> " . . . a cause of action alleged in an amended petition, though founded on the same grievance or injury as that described in the original, is a different cause of action, if it is dependent upon different grounds for holding the defendant responsible for the wrong alleged; and that the power of a court to permit an amendment of a pleading does not authorize an importation which in effect introduces a new or different cause of action."

Since the portion of the Nevada decree relating to child support was admittedly invalid according to the allegations of both parties in the pleadings in this case, this matter became res judicata and was improperly brought forth by an amendment to plaintiff's complaint. Although this defendant set up the bulk of the Nevada decree as a bar to plaintiff's action, and in so doing set forth the provisions of the decree for that purpose, the plaintiff cannot now claim that other parts of the decree should now constitute a new cause of action.

In the case of *Simms vs. Andrews, C. C. A. Oklahoma,* 1941, 118 *Fed. 2d* 803, it was held that an amendment to the pleadings to conform to proof is not authorized merely because evidence, which is competent and material upon issues created by the pleadings, incidentally tends to prove another fact not within the issues in the case. Furthermore, in the case of *Town of Texhoma vs. Neild,* 9 *F.R.D.* 739 *at* 741, the court made the following observation:

> "The matters set up in the supplemental pleading are matters that could have been set up in the original

complaint and litigated in the hearing that resulted in a judgment for the plaintiff. Under all the authorities such matters thus sought to be litigated in the supplemental pleading are now res judicata."

Quoting from the foregoing case of Simms vs. Andrews, which is a case from our own Tenth Circuit Court of Appeals, we find this statement at page 807:

> "The right to amend pleadings to conform to the proof proceeds upon the theory that by such amendment the *pleadings are brought in line with the actual issues upon which the case was tried . . .*

Also, *U. S. vs. Brookhaven,* 134 *Fed. 2d* 442 *at* 446:

> " . . . The provision of Rules of Civil Procedure 15(b), 28 U.S.C.A. . . . looks to supporting the judgment by amendments, or to making the record show more perfectly what was tried and decided. *It does not authorize an amendment to nullify the judgment and begin a new contest."*

In the case of *Sears Roebuck & Co. vs. Marhenke, C. C. A. California,* 1941, 121 *Fed. 2d* 598, it was held that Rule 15(b) applies only in a case in which issues not raised by the pleadings were tried by express or implied consent of the parties.

The federal case of *Popovitch vs. Kasperlik* (1947), 76 *F. Supp.* 223 *at* 239, clearly indicates the tests to be applied Rule 15(b) before allowing an amendment:

> "The tests to be applied when the question arises whether an amended complaint should be filed are—*would a judgment bar any further action on either,*

does the same measure of damages support both, is the same defense open in each, and *is the same measure of proof required.*"

Now, if we apply the tests set forth in the Popovich case to the Amended and Supplemental Complaint in the case before this Court, we can see that the Amended and Supplemental Complaint fell far short of meeting those tests:

First: The measure of damages allowed under the first judgment (Order) (R. 41) following the trial of the matter, and under the theory upon which the case was tried, did not provide any back amounts to be recovered by the plaintiff. On the other hand, plaintiff was allowed to recover judgment for $1435.00 back support under the Amended and Supplemental Complaint.

Second: The same defense is not open to each action. In the action, as tried, the defense to the pleading and proof was that the Nevada decree was subsisting and valid except as to the award for child support. However, when the entire Nevada decree was introduced as the basis of a new cause of action, the defense as to the child support provision had to be other than the existence of the decree itself.

Third: It is quite obvious that the same measure of proof is much different under the theory of the Amended and Supplemental Complaint than it was under the theory that the Nevada decree was invalid. Under the latter theory the introduction of the decree standing alone, in the absence of an affirmative defense, constituted the only proof needed as to make it the decree of the Utah court. However, at the trial,

all of the proof and evidence was directed to setting aside and nullifying that very decree.

(III)

Even if the court had jurisdiction and if it properly allowed the filing of the amended and supplemental pleadings, it erred in granting judgment on the amended and supplemental pleadings.

After plaintiff was permitted to file the Amended and Supplemental Complaint, this defendant answered the same and, as a first defense, raised the objections previously referred to under Rule 15(b) and (d) and also objected to the allowance of any attorney's fee. As a second defense, this defendant alleged that the evidence introduced and admitted at the trial proved that an agreement existed by and between the parties whereby the plaintiff agreed to support the minor child, and that plaintiff should not be allowed to recover any alleged amounts of money based upon the Nevada decree of divorce, or otherwise, for any period of time up to the time of the filing of plaintiff's amended and supplemental complaint.

As a third defense, this defendant raised the issue—made moot by the prior pleadings—that the court of the State of Nevada did not have the jurisdiction over the person of the minor child for the reason that it was not before the court and that the provision respecting the child was inserted by the Nevada court upon the court's own initiative and without any consent of this defendant.

Suffice it to say, in addition to the arguments previously set forth relating to this issue, that the Restatement of Conflict

of Laws has covered this point, indicating that the child must have been domiciled in Nevada:

> "54. Status.
>
> (1) A state which creates any status other than a domestic status has jurisdiction over it.
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> (2) A state has jurisdiction over the domestic status of persons *domiciled within the state.*"
>
> "Comments:
>
> . . .
>
> c. "Domestic status" is the status of husband and wife, or of a child and a parent or guardian."

As a fourth defense to the Amended and Supplemental Complaint, this defendant denied the allegation as to whether the minor child is now self-supporting or has need of support. In fact, the defendant does not actually know whether or not the child is now alive and in existence or whether the mother is remarried. For all he knows, the child could be deceased and the mother could be simply attempting to secure money on a pretense. Furthermore, it does not appear that the plaintiff has affixed her name to any paper or pleading found in the record; and she certainly never appeared to give any evidence, either in person or in any other manner. Based upon a total dearth of evidence and a clear-cut denial in the Answer to the Amended and Supplemental Complaint (R. 51), upon what theory can the Court's fourth finding of fact (the last line thereof) (R. 99), and which is not even included in the Conclusions of Law, be justified?

It should be noted that despite the fact that plaintiff knew of this defendant's whereabouts for over 2½ years following

the Nevada decree, no demand for alimony or support or maintenance was ever made. This was consistent with defendant's understanding of the agreement existing between the parties. Despite such fact, this defendant is again pointing out that the minor child should not be barred from recovering against either of its parents for support simply because the parents entered into an agreement concerning the keeping and custody of the child. However, as between the parents, such an agreement is binding—at least as to past amounts of support allegedly expended by either parent. Evidence concerning such an agreement was brought forth at the hearing on the matter by this defendant, the only person to testify on either side.

See *Krotsky vs. Krotsky* (1915) 169 *App. Div.* 850, 155 *N.Y.S.* 625 and *Pierce vs. Pierce* (1911) 71 *N. Y.* 154, 117 A.L.R. 1184, as stating the rule that conduct similar to that in the case at bar; i.e., the lapse of time and an express or implied agreement, constituted a *waiver* of her right to recover past amounts expended for the support of herself and the minor children.

In allowing amendments the court should never permit the same to work an injustice on either party. In the case of *Hirschhorn vs. Mine Safety Appliances Co.* (1951 101 *F. Supp.* 549 at 552, which involved an amendment before trial, it was stated:

> "The primary question is whether or not the amendment will work injustice on any of the parties."

Under the circumstances of this case, it seems manifestly unfair to permit plaintiff to amend her complaint after trial

and allow her to recover on the very decree she sought to have set aside. This becomes all the more unfair when we examine the statement of plaintiff's counsel (R. 93) concerning the amount of work and the reasonable value, if not more so, than plaintiff's attorney, since this defendant was on the defensive throughout the action?

The uncontradicted evidence brought out the existence of an agreement between the parties relating to child support and custody. This was permitted to stand by Judge Baker as a defense to the claim to past support money claimed to be due (R. 27). Furthermore, at the trial, Judge Van Cott also recognized the defense as valid (R. 74):

> MR. ARNOVITZ: Now at this time we would like to strike all evidence with respect to any agreement that was made with the mother for her own support and the support of the child for the reason and on the grounds that such an agreement would be contrary to public policy.
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> MR. FULLER: In that connection we agree it is contrary to public policy insofar as the child is concerned, but not insofar as the action brought by the wife against this defendant for past amounts due.
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> THE COURT: Well, I would think that is correct, Mr. Arnovitz, isn't it? It may be against public policy so far as the child is concerned and it wouldn't be binding, but as to herself she could make such an agreement.

From the foregoing statement, it clearly appears that Judge Van Cott abused his discretion in allowing plaintiff to recover back support money on a different theory—and one which was made moot by all prior pleadings—for back support

money which he himself recognized could not be recovered under the theory of the case, as tried, by reason of the existence of an agreement which was not controverted by any evidence submitted by plaintiff.

CONCLUSION

It is anticipated that counsel for plaintiff will attempt to influence the court with the argument that the minor child of the parties is willfully being neglected by its father. Such is not the case. This defendant is willing, and has offered, to assist in the support of the child despite the contention that an agreement between the defendant and plaintiff heretofore existed to the effect that she did not wish him to do so.

This defendant has been involved in continuous and harassing litigation for more than one year. He submits that if the minor child of these parties is actually in need of support, he will be amenable to furnishing such support, but absolutely will not pay any money directly to the plaintiff for amounts which *she claims are due to her for past support* furnished to the minor child. Defendant submits that the child will possibly never see such payments, that the child has actually been supported by its maternal grandparents who are people of fairly substantial means, and that the mother will merely spend the money for her own pleasure.

There are procedures whereby this defendant can be accorded his full and complete rights under the law and whereby the minor child can secure needed support and maintenance

from its father. As indicated in the first Dimon vs. Dimon case (244 Pac. 2d at page 976-7), in a state such as Utah which does not have a specific statute allowing a parent to bring an action against the other parent for child support in the absence of an actual divorce proceeding, the child's right to support (which existed at common law and which still exists) is transitory and will follow the father wherever he may be. However, in the absence of such statutory provision, the mother can only bring the action as guardian ad litem for the child. Under such circumstances, the court can provide sufficient safeguards to see that the monies paid are actually expended on behalf of the child.

Another and better remedy which is available to plaintiff —and which should be used if she does not seek to personally come before the Utah courts—is that of the Uniform Reciprocal Enforcement of Support Act. This remedy was also pointed out in the first Dimon vs. Dimon case. Had plaintiff followed this procedure and filed a petition in the proper court of New York, she could have secured support for the child many months ago and this defendant (and the Utah courts) would have been fully informed as to all aspects of the case and the needs of the child.

The Uniform Reciprocal Enforcement of Support Act was created out of the necessity for providing a means of securing support in just such a situation as this. The defendant will necessarily have to submit to such an action if it is brought, but he will at least have the knowledge that the child will be before the court in New York, and he and the proper courts will have an opportunity to ascertain the needs of the child.

This court may find that the jurisdictional argument set forth in this brief has never been raised before by any other member of the bar. However, merely because the point is raised for the first time on appeal, that fact alone should be no reason for disregarding the argument herein contained. The writer has made a very thorough and systematic study of the subject of jurisdiction and the divorce statutes of various states in arriving at the conclusions herein reached.

Counsel for this defendant wishes to anticipate part of the defense which plaintiff may raise in her brief. In this connection, the following points are pertinent:

(1) Some cases might be cited with dicta apparently contra to those herein included relating to the allowance of alimony, but most relate to an allowance of alimony in an "independent" action *before* a divorce is secured.

(2) Each and every case cited wherein alimony has been allowed *after* divorce should be carefully checked against the statutes of the respective states.

(3) All cases cited, whether federal or otherwise, involving an interpretation of Rule 15(b) and (d) should be carefully checked to make sure that the cases do not involve amendments *before* trial and judgment, since such situations are subject to more relaxed principles.

It is submitted that the plaintiff has pursued an incorrect procedure from the very commencement of her action. In view of the arguments and the foregoing, it is submitted that the judgment entered by Judge Ray Van Cott on May 7, 1953, should be set aside as null and void, and that plaintiff be re-

quired to proceed as guardian ad litem in a transitory action or under the Uniform Reciprocal Enforcement of Support Act, or by such other remedies as are available, so that this defendant may have the opportunity of fully knowing what is expected and demanded of him as to the future support of his minor child and, at the same time, be assured that the child personally receives the benefits of such future payments.

Respectfully submitted,

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